No. 75-980

In the Supreme Court of the United States

OCTOBER TERM, 1975

DIFCO LABORATORIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS JR.,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D. C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-980

DIFCO LABORATORIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. The decision and order of the National Labor Relations Board (Pet. App. 8-26) are reported at 216 NLRB No. 13.

JURISDICTION

The order of the court of appeals (Pet. App. 7) was entered on October 13, 1975. The petition for a writ of certiorari was filed on Monday, January 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly found that the Union did not orally

agree to extend the no-strike clause of the previously expired collective bargaining agreement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * * .
>
> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

STATEMENT

1. On August 31, 1973, the bargaining agreement between Difco Laboartories, Inc. (the "Company") and Local Union No. 246, International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (the "Union"), expired after the employees had refused to ratify a new contract negotiated by the Company and the Union bargaining committee (Pet. App. 14). When Union representatives informed the Company of the vote,

a Company spokesman asked if a strike were imminent, explaining that the Company wanted to avoid the spoilage of products that had occurred during a previous strike (Pet. App. 14; A. 36-37, 55-56).[1] One of the Union representatives stated that, before calling a strike, the Union would have to take a strike vote and get authorization for the strike from the International (*ibid.*). He added that, since the process would begin with a notice to employees of a meeting for the strike vote, the Company would have several days' notice before a strike actually began (*ibid.*).

On Tuesday, September 4, the day after Labor Day, Company representatives read a statement to the employees advising them that, although the Company had been disappointed by their rejection of the contract that had been presented to them, contract negotiations would continue and holiday pay for Labor Day would be paid provided there was no walkout (Pet. App. 15; A. 30-31, 43, 67). However, on Thursday morning, September 6, most of the employees at the Company's Romulus plant walked out after the shipping foreman refused to allow the shop steward to phone the Union president to find out when negotiations were scheduled to begin again (Pet. App. 15-16; A. 43-45, 48-50).[2]

As the employees began to leave the plant, the foreman informed a group of employees that they did not have a union at that time and that if they did not return to work they would be fired (Pet. App. 15-16; A. 43-45, 48-50).

---

[1] "A." refers to the appendix filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

[2] The Company operates two plants, one in Detroit and the other in Romulus, Michigan. The Union represents the employees at both plants (Pet. App. 13-14).

Later that day, the conditions that had precipitated the strike were resolved (Pet. App. 16-17; A. 32-35, 46, 50-52), but it was agreed that the employees should not return to work until the following morning. The Company also agreed to consider not taking any retaliatory measures against the employees who had participated in the walkout (Pet. App. 17; A. 41, 61). It was further agreed that probationary employees then at work would finish the production of materials in process, and that the Union would get a truckdriver to load and deliver an emergency shipment (Pet. App. 17; A. 35, 52, 61-62, 65). No raw materials or processed products spoiled as a result of the walkout (Pet. App. 17, 22; A. 66).

The following day, Friday, September 7, all of the employees who had participated in the strike were suspended for three days and disciplinary notices were placed in the files of all but three of those employees (Pet. App. 17-18; A. 27, 36). On the next payday, September 14, the Company paid holiday pay only to those employees who had not participated in the strike (Pet. App. 18; A. 30, 35-36). Thereafter, the Company denied all grievances challenging the Company's failure to pay holiday pay to employees who had participated in the strike, asserting that "since no contract was in effect" at the time of the strike, the grievances were "out of order" (Pet. App. 18).[3]

2. The Administrative Law Judge, whose decision and recommended order the Board adopted (Pet. App. 8-10), held that the strike was concerted activity protected by Section 7 of the Act and that the Company therefore had violated Sections 8(a)(1) and (3) by punishing employees who had participated in it (*id.* at 22-23). In rejecting the Company's contention that there had been a verbal extension of the no-strike clause of the previously expired contract, the Administrative Law Judge found that the statements relied upon by the Company merely assured the Company that it would have sufficient notice before a strike occurred to prevent product spoilage and that no spoilage had occurred as a result of the strike at the Romulus plant (Pet. 20-22). The Board therefore ordered the Company to cease and desist its unlawful conduct and to restore to employees who had been disciplined the benefits that had been denied them (*id.* at 8-10, 23-26).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 7).

[3]On September 10, 1973, the parties entered into a new collective agreement, effective that day (Pet. App. 12, 18; A. 29).

ARGUMENT

The only issue presented in this case is whether statements made by a Union representative constituted a verbal extension of the no-strike clause of the previously-expired collective agreement between the Company and the Union. Such an issue does not warrant review by this Court. In any event, the record in this case amply supports the Board's findings that the Union representative had not agreed to an extension of the no-strike clause but had merely explained that, as a practical matter, the Company would have sufficient notice before a strike actually began to prevent spoilage at its plants.[4] In fact, when the one-day strike did take

[4]In *The Arundel Corp.*, 210 NLRB 525, upon which petitioner principally relies (Pet. 4-5), the General Counsel of the Board and the parties had stipulated that the no-strike provision of the expired contract had been extended.

place, the Union cooperated with the Company and prevented any spoilage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

FEBRUARY 1976.

DOJ-1976-02